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CITATIONS

284677—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 653

ATLAS MILLING COMPANY, A CORPORATION,
PETITIONER

v.

HENRY C. JONES, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 42–49) is reported in 29 F. Supp. 942. The opinions of the Circuit Court of Appeals (R. 53–56, 58–60) are reported in 115 F. (2d) 61.

JURISDICTION

The original judgment of the Circuit Court of Appeals was entered on June 5, 1940 (R. 56), and the judgment after rehearing was entered on October 14, 1940 (R. 60). The petition for a writ of certiorari was filed on December 26, 1940.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a milling corporation, engaged in recovering minerals from residue deposited on the surface above a mine in prior years, is entitled to a percentage depletion allowance under Section 23 (l) and (m) and Section 114 (b) (4) of the Revenue Act of 1932.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are printed in the Appendix to the petition, pp. 17–19.

STATEMENT

Petitioner is a corporation engaged in milling operations in the State of Oklahoma. (R. 16.) In 1933, it entered into tailing or milling agreements giving it the exclusive right to recover lead and zinc ores from "tailings, sludge, slime, chats, and sands" which had theretofore been dumped on certain property during mining operations. (R. 33–41, 49.) Petitioner agreed to pay "as its rent or royalty" specified percentages of its receipts from sales of recovered minerals. (R. 35, 40.) During 1933 petitioner received gross receipts of $43,579.84 from sales of recovered minerals. Rents or royalties amounting to $10,782.18 were paid, leaving net receipts of $32,797.66. In

its tax return petitioner claimed a depletion allowance of fifteen per cent of this sum, under Section 114 (b) (4) of the Revenue Act of 1932. The Commissioner took the position that petitioner was not entitled to percentage depletion, and limited petitioner's allowance for depletion to an amortization of the cost to petitioner of the tailing agreements. (R. 17–18.) Petitioner paid the tax as so computed, and sued for refund. (R. 54.) The District Court gave judgment for the Collector (R. 50), and the Circuit Court of Appeals affirmed (R. 56, 60).

ARGUMENT

The Commissioner has permitted petitioner an allowance for depletion computed in the ordinary way, by amortization of the cost to petitioner of the tailing agreements, and also a deduction for depreciation on petitioner's mill and equipment. (R. 17–18.) By this method petitioner will receive the return of its entire capital investment. Petitioner's contention is that it is entitled to percentage depletion under Section 23 (l) and (m) and Section 114 (b) (4) of the Revenue Act of 1932. It is, however, well settled that percentage depletion is available only to those having a capital investment in minerals "in place". *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 367. Petitioner has no such investment: it is but a processor, like the taxpayer in the *Bankline* case. (Cf. R. 30.) Under its agreements petitioner had no

right to extract ore from the mine, but only to treat and recover minerals from the tailings on the surface.

Petitioner cites *Herring* v. *Commissioner,* 293 U. S. 322, as in conflict with the decision below. There this Court held that the lessor might take a percentage depletion allowance against advance royalties and bonuses received under an oil and gas lease, even though there was no production on the property during the year. Clearly the payments in that case were made for the right to extract oil in place; the question was only whether the fact that the right had not yet been exercised precluded a depletion allowance.

In all the other cases involving depletion allowances cited by petitioner the taxpayers' interest attached before the oil or mineral yielding the income had been extracted or removed from the well or mine.[1] Therefore, those decisions do not conflict with the holding below.

Petitioner urges that mine tailings continue to be a part of a mining property, citing *Manson* v. *Dayton,* 153 Fed. 258 (C. C. A. 8th); *Ritter* v. *Lynch,* 123 Fed. 930 (C. C. D. Nev.); *Steinfeld* v. *Omega Copper Co.,* 16 Ariz. 230, 141 Pac. 847.

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[1] *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364; *Burnet* v. *Harmel*, 287 U. S. 103; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299; *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308; *Palmer* v. *Bender*, 287 U. S. 551; *Thomas* v. *Perkins*, 301 U. S. 655; *Anderson* v. *Helvering*, 310 U. S. 404.

But this does not mean that tailings are minerals "in place" within the revenue act.

Petitioner also cites cases in support of the proposition that the extraction of ores from tailings is a continuation of the mining process. *Noble* v. *Gustafson*, 204 Fed. 69 (C. C. A. 9th); *Waskey* v. *M'Naught*, 163 Fed. 929 (C. C. A. 9th); *United States* v. *United Verde etc. Co.*, 8 Ariz. 186, 71 Pac. 954. In all of those cases the processing was being done as part of the original mining process, and such cases would in any event be of little relevance in the construction of federal tax statutes.

CONCLUSION

There is no conflict and no question of general importance is presented; therefore the petition should be denied.

Respectfully submitted.

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